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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff(s),

v.

RUSSELL WAYNE MAESTRO,

Defendant(s).

2:09-CR-177 JCM (LRL)

**ORDER**

Presently before the court is defendant Russell Wayne Maestro's 28 U.S.C. § 2255 motion to vacate. (Doc. # 59). The government filed an opposition. (Doc. # 62). Though the deadline has passed, defendant has not filed a reply.

Motions to vacate a sentence pursuant to section 2255 are subject to a one-year statute of limitations. 28 U.S.C. § 2255(f). The one-year period runs from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1).

A district court may, however, equitably toll the one-year statutory limit where a petitioner "shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 632 (2010) (internal quotations and citation omitted). The defendant bears a heavy burden in showing that equitable tolling should apply. *Miranda v Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002). The Ninth Circuit has explained that courts should apply the equitable tolling doctrine narrowly, "lest the

1 exceptions swallow the rule.” *Id.* at 1066.

2 For example, the Ninth Circuit has explained that “[t]he Supreme Court and the policies  
3 behind AEDPA require that equitable tolling be used only to protect diligent petitioners facing  
4 extraordinary circumstances that prevent them from timely filing federal habeas petitions”  
5 and “[t]he exception for equitable tolling cannot be interpreted so broadly as to displace the  
6 statutory limitations that Congress crafted.” *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008,  
7 1014 (9th Cir. 2009) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

8 The court finds that Mr. Maestro has failed to carry his burden.

9 Mr. Maestro was sentenced on July 25, 2011. (Doc. # 56). The judgment of conviction was  
10 entered on July 29, 2011. (Doc. # 58). Mr. Maestro failed to appeal this court’s sentence within the  
11 applicable 14-day period created by Fed. R. App. P. 4(b)(1)(A). Accordingly, this court’s judgment  
12 became final on August 12, 2011 and Mr. Maestro’s one-year period to file his § 2255 motion began  
13 on that day. *See United States v. Schwartz*, 274 F.3d 1220, 1223 (9th Cir. 2001) (explaining that the  
14 statute of limitations to file a § 2255 motion begins to run upon the expiration of the time during  
15 which a petitioner could have sought review by direct appeal).

16 The instant motion was therefore filed 826 days after Mr. Maestro’s conviction became final,  
17 and 461 days after the statutory period elapsed. Mr. Maestro requests that this court equitably toll  
18 the limitations period in light of an incident that took place in November 2011 in which he broke his  
19 arm. However, Mr. Maestro fails to explain how his broken arm caused a 461-day delay in his filing  
20 of the instant motion.


21 Without ruling out the possibility that bodily injury could justify tolling the statute of  
22 limitations for a section 2255 motion, the court finds Mr. Maestro’s conclusion that he would have  
23 filed the instant motion 461 days earlier if he had not suffered a broken arm implausible. Thus, the  
24 motion will be denied. *See United States v. Aguirre-Ganceda*, 592 F.3d 1043, 1045 (9th Cir.  
25 2010)(noting that a court cannot toll the one-year limitation period absent a showing of diligence and  
26 extraordinary circumstances, and observing that “the threshold necessary to trigger equitable tolling  
27 is very high”)(internal quotations and citation omitted).

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Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Russell Wayne  
Maestro's motion to vacate pursuant to 28 U.S.C. § 2255 (doc. # 59) be, and the same hereby is,  
DENIED as untimely.

DATED May 2, 2014.

  
UNITED STATES DISTRICT JUDGE